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Responsibility of international organizations

Responsibility of international organizations

Compilation of decisions of international courts and tribunals

Report of the Secretary-General

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* [A/72/50](#).



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Abbreviations

DARIO	Draft articles on the responsibility of international organizations
DARS	Draft articles on responsibility of States for internationally wrongful acts
ECHR	European Court of Human Rights
ECT	Energy Charter Treaty
EU	European Union
EUNAVFOR	European Union-led naval force
FET	Fair and equitable treatment
ICSID	International Centre for Settlement of Investment Disputes
ILC	International Law Commission
ISAF	International Security Assistance Force
KFOR	Kosovo Force
NATO	North Atlantic Treaty Organization
OSCE	Organization for Security and Cooperation in Europe
PPA	Power Purchase Agreement
REIO	Regional Economic Integration Organization
SG	Secretary-General
SRSG	Special Representative of the Secretary-General
TCN	Troop-Contributing Nation
UAAC	Ultimate Authority and Control
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNMIK	United Nations Mission in Kosovo
UNSC	United Nations Security Council
UK	United Kingdom of Great Britain and Northern Ireland
US	United States of America

I. Introduction

1. The International Law Commission adopted the articles on the responsibility of international organizations at its sixty-third session, in 2011. In its resolution [66/100](#) of 9 December 2011, the General Assembly took note of the articles on the responsibility of international organizations presented by the Commission, the text of which was annexed to that resolution, and commended them to the attention of governments and international organizations without prejudice to the question of their future adoption or other appropriate action.

2. In its resolution [69/126](#) of 10 December 2014, the General Assembly commended once again the articles on the responsibility of international organizations to the attention of governments and international organizations without prejudice to the question of their future adoption or other appropriate action. Moreover, the Assembly requested the Secretary-General to invite governments to submit their written comments on any future action regarding the articles. It also requested the Secretary-General to prepare an initial compilation of decisions of international courts, tribunals and other bodies referring to the articles, to invite governments and international organizations to submit information on their practice in this regard and to submit the material well in advance of its seventy-second session.

3. By notes verbales dated 7 January 2015 and 12 January 2016, the Secretary-General invited governments to submit, no later than 1 February 2017, their written comments on any future action regarding the articles on the responsibility of international organizations. In those notes, he also invited governments to submit information regarding practice relating to decisions of international courts, tribunals and other bodies referring to the articles. The Under-Secretary-General for Legal Affairs, the Legal Counsel, also addressed a communication, dated 8 February 2016, to 22 international organizations and entities bringing to their attention resolution [69/126](#), and inviting them to submit, no later than 1 February 2017, comments and information in accordance with the request of the General Assembly.

4. The present compilation includes an analysis of nine cases in which the articles on the responsibility of international organizations were referred to in decisions by international courts, tribunals and other bodies taken during the period from 1 January 2004 to 31 December 2016.¹ Such references were found in the decisions of an international arbitral tribunal; the African Commission on Human and Peoples' Rights; the European Court of Human Rights; the Caribbean Court of Justice and the General Court of the European Union. The compilation also includes 12 decisions by domestic courts in Germany, the Netherlands and the United Kingdom of Great Britain and Northern Ireland. Those decisions were found during the search for references to the articles in decisions by international courts, tribunals and other bodies, and have been included for the benefit of Member States. Given the scope of the compilation, which is limited to international decisions, the Secretariat did not conduct a systematic search of domestic jurisdictions.

5. The present compilation reproduces the relevant extracts of publicly available decisions under each of the articles referred to by international, and sometimes national, courts, tribunals or bodies, following the structure and numerical order of the articles on the responsibility of international organizations as adopted on second reading in 2011. Under each article, decisions appear in chronological order. Decisions by different courts concerning the same case are grouped together. International decisions are listed separately from national decisions.

¹ Joined cases that resulted in the same decision have been counted as one case. Cases that resulted in largely similar decisions have been counted separately, but might have been referred to as one decision to the extent that the content of the decisions is identical.

6. The compilation includes only the relevant extracts of the decisions referring to the articles on the responsibility of international organizations, together with a brief description of the context in which the reference was made. In those extracts, the articles are invoked as the basis for the decision or referred to as reflecting the existing law governing the issue at hand. The compilation does not cover the submissions of the parties invoking the articles, nor opinions of judges appended to a decision.²

II. Extracts of decisions referring to the articles on responsibility of international organizations

General comments

International decisions

General Court of the European Union

7. In *Front populaire pour la libération de la saquia-el-hamra et du rio de oro (Front Polisario) v. Council of the European Union*, the General Court observed that “the applicant relies on various provisions of [the] draft articles on the responsibility of international organisations for internationally wrongful acts, as adopted in 2011 by the International Law Commission of the UN, in order to argue that by adopting the contested decision the Council renders the European Union liable under international law for an internationally wrongful act”.³ However, the General Court concluded that

that plea in law does not introduce anything new with regard to the applicant’s other arguments. It must be recalled that the present action is an action for annulment and not an action for damages. The issue is not whether the European Union has incurred non-contractual liability by adopting the contested decision, which presupposes that that decision is vitiated with illegality. The issue is whether in fact the contested decision is vitiated with illegality.⁴

National decisions

Supreme Court of the Netherlands

8. In *State of the Netherlands v. Mustafić-Mujić* and *State of the Netherlands v. Nuhanović*, the Supreme Court of the Netherlands observed that:

In establishing the rules developed in unwritten international law for deciding on what conditions conduct can be attributed to a State or to an international organization, the Supreme Court will refer to two sets of rules drawn up by the International Law Commission (ILC) of the United Nations, namely the Draft Articles on Responsibility of States for Internationally Wrongful Acts of 2001

² See the “Dissenting opinion of Judge Pinto de Albuquerque”, in European Court of Human Rights, *Sargsyan v. Azerbaijan*, application No. 40167/06, judgment (merits), 16 June 2015, para. 31 (footnote 59); the “Concurring opinion of Judge Keller”, in European Court of Human Rights, *Al-Dulimi and Montana Management Inc. v. Switzerland*, application No. 5809/08, judgment, 21 June 2016, para. 26 (footnote 8); and the “Opinions of the Lords of Appeal”, in House of Lords, *R (on the application of Al-Jedda) (FC) v. Secretary of State for Defence*, case No. [2007] UKHL 58, judgment, 12 December 2007, para. 65.

³ General Court of the European Union (Eighth Chamber), *Front populaire pour la libération de la saquia-el-hamra et du rio de oro (Front Polisario) v. Council of the European Union*, case No. T-512/12, judgment, 10 December 2015, para. 212.

⁴ *Ibid.*, para. 213.

(below: DARS) and the Draft Articles on the Responsibility of International Organizations of 2011 (below: DARIO).⁵

England and Wales High Court (Queen's Bench Division)

9. The England and Wales High Court (Queen's Bench Division) in *Kontic and Others v. Ministry of Defence* stated that:

The draft Articles and Commentary from the ILC are deserving of respect. However, as the Defendant points out, none of these provisions constitute a treaty, nor do they constitute customary international law. The UN General Assembly "took note" of the DARIO and "commended" them on 9 December 2011 "without prejudice to the question of their future adoption". A similar formulation was expressed by the General Assembly in 2014.⁶

The court explained that it "pay[s] regard to this material in exactly that manner".⁷

Part Two

The internationally wrongful act of an international organization

Chapter I

General principles

Article 4

Elements of an internationally wrongful act of an international organization

International decisions

European Court of Human Rights

10. In its decision on admissibility in *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway*, the Grand Chamber of the European Court of Human Rights referred to article 3 (now article 4) of the articles on the responsibility of international organizations as relevant law and practice.⁸ Explaining the structure of its decision, the court stated that it

has ascertained whether the impugned action of KFOR (detention in *Saramati*) and inaction of UNMIK (failure to de-mine in *Behrami*) could be attributed to the UN: in so doing, it has examined whether there was a Chapter VII [of the Charter of the United Nations] framework for KFOR and UNMIK and, if so, whether their impugned action and omission could be attributed, in principle, to the UN. The Court has used the term "attribution" in the same way as the ILC in Article 3 of its draft Articles on the Responsibility of International Organisations.⁹

⁵ Supreme Court of the Netherlands (First Chamber), *State of the Netherlands v. Mustafić-Mujić*, case No. 12/03329, judgment, 6 September 2013, para. 3.7, and *State of the Netherlands v. Nuhanović*, case No. 12/03324, judgment, 6 September 2013, para. 3.7.

⁶ Royal Courts of Justice (England and Wales High Court, Queen's Bench Division), *Kontic and Others v. Ministry of Defence*, case No. HQ14X02291, judgment, 4 August 2016, para. 116.

⁷ *Ibid.*, para. 117.

⁸ European Court of Human Rights (Grand Chamber), *Behrami and Behrami v. France* application No. 71412/01 and *Saramati v. France, Germany And Norway*, application No. 78166/01, decision (admissibility), 2 May 2007, para. 29.

⁹ *Ibid.*, para. 121.

European Court of Human Rights

11. In assessing admissibility in *Berić and Others v. Bosnia and Herzegovina*, the Grand Chamber of the European Court of Human Rights referred to article 3 (now article 4) of the articles on the responsibility of international organizations as relevant law and practice.¹⁰ The court further noted that “the applicants pleaded that the UN did not exercise ‘effective control’ over the conduct of the High Representative within the meaning of draft article 3 of the Draft Articles on the Responsibility of International Organisations and that, accordingly, the conduct in question was not attributable to the UN”.¹¹ After examining the nature of delegation of powers from the Security Council to the High Representative, the court “observe[d] that the High Representative was exercising lawfully delegated UNSC Chapter VII powers, so that the impugned action was, in principle, ‘attributable’ to the UN within the meaning of draft article 3 of the Draft Articles on the Responsibility of International Organisations”.¹² The court thus “conclude[d] that the applicants’ complaints must be declared incompatible *ratione personae* within the meaning of Article 35 § 3 of the [European] Convention”.¹³

England and Wales High Court (Queen’s Bench Division)

12. In the case of *Kontić and Others v. Ministry of Defence*, the England and Wales High Court (Queen’s Bench Division), while discussing the case of *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway* before the European Court of Human Rights, noted that: “The [European] Court next considered whether the relevant actions or omissions were attributable to the UN. The Court: ‘... used the term “attribution” in the same way as the ILC [International Law Commission] in Article 3 of its draft Articles on the Responsibility of International Organisations’”.¹⁴ The court ultimately concluded that “the relevant acts and omissions complained of are as a matter of law attributable to the United Nations, and not to the United Kingdom”.¹⁵

Chapter II

Attribution of conduct to an international organization

General comments

International decisions

International arbitral tribunal (under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States)

13. The arbitral tribunal in the case of *Electrabel S.A. v. Hungary* referred to a letter by Hungary citing an academic article,¹⁶ and explained that the author, Frank Hoffmeister,

¹⁰ European Court of Human Rights (Fourth Section), *Berić and Others v. Bosnia and Herzegovina*, application Nos. 36357/04, 36360/04, 38346/04, 41705/04, 45190/04, 45578/04, 45579/04, 45580/04, 91/05, 97/05, 100/05, 101/05, 1121/05, 1123/05, 1125/05, 1129/05, 1132/05, 1133/05, 1169/05, 1172/05, 1175/05, 1177/05, 1180/05, 1185/05, 20793/05 and 25496/05, decision (admissibility), 16 October 2007, para. 8.

¹¹ *Ibid.*, para. 22.

¹² *Ibid.*, para. 28.

¹³ *Ibid.*, para. 30.

¹⁴ Royal Courts of Justice, *Kontić and Others v. Ministry of Defence*, para. 81.

¹⁵ *Ibid.*, para. 135. On the reasoning of the court, see para. 30.

¹⁶ See Frank Hoffmeister, “Litigating against the European Union and its Member States — Who Responds under the ILC’s Draft Articles on International Responsibility of International Organizations?”, *European Journal of International Law*, vol. 21, No. 3 (2010).

there concluded that the conduct of a State that executes the law or acts under the normative control of an REIO (i.e. a Regional Economic Integration Organization as defined in Article 1 ECT) may be considered an act of that organisation under international law, taking account of the nature of the organisation's external competence and its international obligations in the field where the conduct occurred; and, specifically in regard to the ECT, Professor Hoffmeister expressed the view that "liability would normally fall upon the EU if Member States' organs were simply implementing EU law".¹⁷

The tribunal decided that:

For these reasons ... that if and to the extent that the European Commission's Final Decision required Hungary, under EU law, prematurely to terminate Dunamenti's PPA, that act by the Commission cannot give rise to liability for Hungary under the ECT's FET standard.¹⁸

National decisions

Supreme Court of the Netherlands

14. The Supreme Court of the Netherlands, in *State of the Netherlands v. Mustafić-Mujić* and *State of the Netherlands v. Nuhanović*, explained that:

The Commentary on Part Two, Chapter II DARIO (at [para. (4)]) notes that articles 6-9 DARIO do not necessarily mean that conduct must be exclusively attributed to an international organization — thereby resulting in exclusive responsibility of the international organization — but instead leave open the possibility of conduct being attributed to an international organization and a State, which would then result in dual attribution to the international organization and the State concerned.¹⁹

Article 6

Conduct of organs or agents of an international organization²⁰

European Court of Human Rights

15. In the case of *Jaloud v. The Netherlands* the Grand Chamber of the European Court of Human Rights considered the cases of *Mustafić v. State of the Netherlands* and *Nuhanović v. State of the Netherlands* before Dutch courts as relevant domestic case-law.²¹ In this context, the court cites excerpts from the judgment of the Supreme Court of the Netherlands in *State of the Netherlands v. Nuhanović* that discusses article 6 of the articles of the responsibility of international organizations.²²

¹⁷ International Centre for Settlement of Investment Disputes, case No. ARB/07/19, award, 25 November 2015, para. 6.75.

¹⁸ Ibid., para. 6.76.

¹⁹ See Supreme Court of the Netherlands, *State of the Netherlands v. Mustafić-Mujić*, para. 3.9.4, and *State of the Netherlands v. Nuhanović*, para. 3.9.4.

²⁰ See also Supreme Court of the Netherlands, *State of the Netherlands v. Mustafić-Mujić* and *State of the Netherlands v. Nuhanović*.

²¹ European Court of Human Rights (Grand Chamber), *Jaloud v. The Netherlands*, application No. 47708/08, judgment, 20 November 2014.

²² Ibid., para. 74. See also Supreme Court of the Netherlands, *State of the Netherlands v. Mustafić-Mujić* and *State of the Netherlands v. Nuhanović*.

Article 7

Conduct of organs of a State or organs or agents of an international organization placed at the disposal of another international organization

International decisions

European Court of Human Rights

16. In assessing admissibility in *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway*, the Grand Chamber of the European Court of Human Rights referred to article 5 (now article 7) of the draft articles on the responsibility of international organizations as relevant law and practice.²³ Citing the ILC commentary to article 5 (now article 7) of the articles, in the version provisionally adopted in 2004, the court pointed out that:

The report [of the ILC containing the commentary] noted that it would be difficult to attribute to the UN action resulting from contingents operating under national rather than UN command and that in joint operations, international responsibility would be determined, absent an agreement, according to the degree of effective control exercised by either party in the conduct of the operation.²⁴

17. In relation to the question whether the impugned action could be attributed to KFOR, the court

consider[ed] it essential to recall at this point that the necessary ... donation of troops by willing TCNs means that, in practice, those TCNs retain some authority over those troops (for reasons, inter alia, of safety, discipline and accountability) and certain obligations in their regard (material provision including uniforms and equipment). NATO's command of operational matters was not therefore intended to be exclusive, but the essential question was whether, despite such TCN involvement, it was "effective".²⁵

After examining the command and control structures of KFOR and its relationship with the Security Council, the court found "that the UNSC retained ultimate authority and control and that effective command of the relevant operational matters was retained by NATO".²⁶ The court continued to observe that:

In such circumstances ... KFOR was exercising lawfully delegated Chapter VII powers of the UNSC so that the impugned action was, in principle, "attributable" to the UN within the meaning of the word outlined at paragraphs 29 and 121 [referring to article 4 of the articles on the responsibility of international organizations] above.²⁷

18. Answering the question whether the impugned action could be attributed to UNMIK, the court explained:

In contrast to KFOR, UNMIK was a subsidiary organ of the UN. Whether it was a subsidiary organ of the SG or of the UNSC, whether it had a legal personality separate to the UN, whether the delegation of power by the UNSC to the SG and/or UNMIK also respected the role of the UNSC for which Article 24 of the Charter provided, UNMIK was a subsidiary organ of the UN institutionally directly and fully answerable to the UNSC (see ILC report ...

²³ See European Court of Human Rights, *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway*.

²⁴ Ibid., para. 32.

²⁵ Ibid., para. 138.

²⁶ Ibid., para. 140.

²⁷ Ibid., para. 141. See also the discussion in para. 10.

above). While UNMIK comprised four pillars (three of which were at the time led by UNHCR, the OSCE and the EU), each pillar was under the authority of a Deputy SRSG, who reported to the SRSG who in turn reported to the UNSC (Article 20 of UNSC Resolution 1244).

Accordingly, the Court notes that UNMIK was a subsidiary organ of the UN created under Chapter VII of the Charter so that the impugned inaction was, in principle, “attributable” to the UN in the same sense.²⁸

The court found that it was “therefore the case that the impugned action and inaction are, in principle, attributable to the UN”²⁹ and “conclude[d] that the applicants’ complaints must be declared incompatible *ratione personae* with the provisions of the [European] Convention”.³⁰

European Court of Human Rights

19. In assessing admissibility in *Berić and Others v. Bosnia and Herzegovina*, the Grand Chamber of the European Court of Human Rights stated that the “key question ... is whether the UNSC, in delegating its powers by UNSC Resolution 1031, retained effective overall control (see draft article 5 of the Draft Articles on the Responsibility of International Organisations ...)”.³¹ The Court found that the Security Council retained “effective overall control” as the delegation from the Security Council “was neither presumed nor implicit, but prior to and explicit in the Resolution itself”.³² The court further noted that: “Secondly, the Resolution (read together with the annexed Peace Agreement and the Conclusions of the London Peace Implementation Conference to which it expressly referred) put sufficiently defined limits on the delegation.”³³ Thirdly, the court emphasized that “the High Representative was required by the Resolution to report to the UNSC, so as to allow the UNSC to exercise its overall control (thus, the UNSC was to ‘remain seized of the matter’ under Paragraph 40 of the Resolution)”.³⁴ The court then came to the conclusion expounded above “that the impugned action was, in principle, ‘attributable’ to the UN within the meaning of draft article 3 of the Draft Articles on the Responsibility of International Organisations”.³⁵

European Court of Human Rights

20. In establishing that the applicant fell within the jurisdiction of the United Kingdom in *Al-Jedda v. United Kingdom*, the Grand Chamber of the European Court of Human Rights referred to article 5 (now article 7) of the articles on the responsibility of international organizations, in the version provisionally adopted in 2004, as relevant international law materials and cited paragraphs (1), (6) and (7) of the commentary to article 5 (now article 7).³⁶ In its assessment, the court stated:

It would appear from the opinion of Lord Bingham in the first set of proceedings brought by the applicant that it was common ground between the parties before the House of Lords that the test to be applied in order to

²⁸ Ibid., paras. 142-143.

²⁹ Ibid., para. 144.

³⁰ Ibid., para. 152.

³¹ European Court of Human Rights (Fourth Section), *Berić and Others v. Bosnia and Herzegovina*, para. 27.

³² Ibid., paras. 27-28.

³³ Ibid., para. 28.

³⁴ Ibid.

³⁵ Ibid. See also the discussion in para. 11.

³⁶ European Court of Human Rights (Grand Chamber), *Al-Jedda v. United Kingdom*, application No. 27021/08, judgment, 7 July 2011, para. 56.

establish attribution was that set out by the International Law Commission in Article 5 of its Draft Articles on the Responsibility of International Organisations and in its commentary thereon, namely that the conduct of an organ of a State placed at the disposal of an international organisation should be attributable under international law to that organisation if the organisation exercises effective control over that conduct. ... For the reasons set out above, the Court considers that the United Nations Security Council had neither effective control nor ultimate authority and control over the acts and omissions of troops within the Multinational Force and that the applicant's detention was not, therefore, attributable to the United Nations.³⁷

After finding that the relevant detention facility in Basra City was controlled exclusively by British forces and that the decision to hold the applicant in internment was made by the British officer in command of the detention facility,³⁸ the court agreed "with the majority of the House of Lords that the internment of the applicant was attributable to the United Kingdom and that during his internment the applicant fell within the jurisdiction of the United Kingdom for the purpose of Article 1 of the Convention".³⁹

European Court of Human Rights

21. In the *Jaloud v. The Netherlands* case, the Grand Chamber of the European Court of Human Rights considered the cases of *Mustafić v. State of the Netherlands* and *Nuhanović v. State of the Netherlands* before Dutch courts to be relevant domestic case-law.⁴⁰ In this context, the court cited excerpts from the judgment of the Supreme Court of the Netherlands in *State of the Netherlands v. Nuhanović* that discussed article 7 of the articles of the responsibility of international organizations.⁴¹

National decisions

United Kingdom House of Lords

22. In *R (on the application of Al-Jedda) (FC) v. Secretary of State for Defence* the United Kingdom House of Lords discussed the judgment of the European Court of Human Rights in the case of *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, stating that: "It was common ground between the parties that the governing principle is that expressed by the International Law Commission in article 5 of its draft articles on the Responsibility of International Organizations (adopted in May 2004 and cited by the European Court in *Behrami and Saramati*, para. 30)".⁴² The House of Lords further observed that: "The European Court also quoted (para. 31) from paras 1 and 6-7 of the ILC's authoritative commentary on this article ...".⁴³ Distinguishing the *Behrami and Behrami v. France and Saramati v. France, Germany and Norway* case on the facts, the House of Lords concluded that "it cannot realistically be said that US and UK

³⁷ Ibid., para. 84.

³⁸ Ibid., para. 85.

³⁹ Ibid., para. 86.

⁴⁰ See European Court of Human Rights, *Jaloud v. The Netherlands*, paras. 70-74.

⁴¹ Ibid., para. 74. See also Supreme Court of the Netherlands, *State of the Netherlands v. Mustafić-Mujić* and *State of the Netherlands v. Nuhanović*.

⁴² See "Opinions of the Lords of Appeal", in House of Lords, *R (on the application of Al-Jedda) (FC) v. Secretary of State for Defence*, case No. [2007] UKHL 58, judgment, 12 December 2007, para. 5.

⁴³ Ibid.

forces were under the effective command and control of the UN, or that UK forces were under such command and control when they detained the appellant”.⁴⁴

District Court of The Hague

23. The District Court of The Hague in *Mustafić-Mujić v. State of the Netherlands* and in *Nuhanović v. State of the Netherlands* explained that:

If a public body of state A or (another) person or entity with public status (according to the law of state A) is made available to state B in order to implement aspects of the authoritative power of state B, then the actions of that body, person or entity are considered as actions of state B. This rule, considered international common law, is part of the articles accepted by the International Law Commission (ILC) under the auspices of the United Nations concerning the liability of states. According to this rule the attribution should concern acting with the consent, on the authority and “under direction and control” of the other state and for its purposes.⁴⁵

The District Court of The Hague further stated that:

In accordance with the existing international practice and the “draft articles” of the ILC concerning the liability of international organizations, the court applies this rule by means of analogy to the attribution of the actions of armed forces made available by states to the United Nations. The court therefore considers incorrect [the claimants’] assertion that the making available of Dutchbat to the United Nations can have no legal consequences under international law for the citizens of Bosnia-Herzegovina.⁴⁶

The District Court then concluded “with reference to the legal framework for assessment given under 4.8 and 4.10 [4.6 and 4.8], that these acts and omissions [of Dutchbat] should be attributed strictly, as a matter of principle, to the United Nations”.⁴⁷

Court of Appeal of The Hague

24. The Court of Appeal of The Hague in *Mustafić-Mujić v. State of the Netherlands* and in *Nuhanović v. State of the Netherlands* stated that:

In international law literature, as also in the work of the ILC, the generally accepted opinion is that if a State places troops at the disposal of the UN for the execution of a peacekeeping mission, the question as to whom a specific conduct of such troops should be attributed, depends on the question which of both parties has “effective control” over the relevant conduct.

...

This opinion has also found expression in the draft articles on the Responsibility of international organizations of the ILC, of which Article 6 reads as follows:

“The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization

⁴⁴ Ibid., para. 23.

⁴⁵ District Court of The Hague, *Mustafić-Mujić v. State of the Netherlands*, case No. 265618/HA ZA 06-1672, judgment, 10 September 2008, para. 4.10, and *Nuhanović v. State of the Netherlands*, case No. 265615/HA ZA 06-1671, judgment, 10 September 2008, para. 4.8.

⁴⁶ Ibid.

⁴⁷ Ibid., para. 4.13, and *ibid.*, para. 4.11.

shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.”

Although strictly speaking this provision only mentions “effective control” in relation to attribution to the “hiring” international organization, it is assumed that the same criterion applies to the question whether the conduct of troops should be attributed to the State who places these troops at the disposal of that other international organization.⁴⁸

The Court of Appeal continued to explain that it

adopts as a starting point that the possibility that more than one party has “effective control” is generally accepted, which means that it cannot be ruled out that the application of this criterion results in the possibility of attribution to more than one party. For this reason the Court will only examine if the State exercised “effective control” over the alleged conduct and will not answer the question whether the UN also had “effective control”.⁴⁹

The Court of Appeal concluded “that the State possessed ‘effective control’ over the alleged conduct of Dutchbat that is the subject of Mustafić et al.’s claim and that this conduct can be attributed to the State”.⁵⁰

Supreme Court of the Netherlands

25. On the question whether “attribution of the conduct of such a troop contingent [Dutchbat] should be made by reference to article 6 DARIO and not by reference to article 7 DARIO”,⁵¹ the Supreme Court of the Netherlands, in *State of the Netherlands v. Mustafić-Mujić* and *State of the Netherlands v. Nuhanović*, explained that:

It is apparent from the Commentary on article 7 DARIO ... that this attribution rule applies, inter alia, to the situation in which a State places troops at the disposal of the United Nations in the context of a UN peace mission, and command and control is transferred to the United Nations, but the disciplinary powers and criminal jurisdiction (the “organic command”) remain vested in the seconding State. It is implicit in the findings of the Court of Appeal that this situation occurs in the present case. After all, in finding of law 5.10 of the interim judgment the Court of Appeal has held — and this has not been disputed in the cassation appeal — that it is not at issue that the Netherlands, as the troop-contributing State, retained control over the personnel affairs of the military personnel concerned, who had remained in the service of the Netherlands, and retained the power to punish these military personnel under disciplinary and criminal law. The submission in part 1 of the cassation appeal that the Court of Appeal has failed to apply the attribution rule of article 6 DARIO and has instead wrongly applied the attribution rule of article 7 DARIO therefore fails.⁵²

⁴⁸ Court of Appeal of The Hague, *Mustafić-Mujić v. State of the Netherlands*, case No. 200.020.173/01, judgment, 5 July 2011, para. 5.8, and *Nuhanović v. State of the Netherlands*, case No. 200.020.174/01, judgment, 5 July 2011, para. 5.8.

⁴⁹ Ibid., para. 5.9, and *ibid.*, para. 5.9.

⁵⁰ Ibid., para. 5.20, and *ibid.*, para. 5.20.

⁵¹ Supreme Court of the Netherlands, *State of the Netherlands v. Mustafić-Mujić*, para. 3.10.1, and *State of the Netherlands v. Nuhanović*, para. 3.10.1.

⁵² Ibid., para. 3.10.2, and *ibid.*, para. 3.10.2.

England and Wales High Court (Queen's Bench Division)

26. In *Serdar Mohammed v. Ministry of Defence and Mohammed Qasim & Others v. Secretary of State for Defence*, the England and Wales High Court (Queen's Bench Division) recalled that:

The appellate committee of the House of Lords (by a 4-1 majority) decided this issue in favour of the claimant. Lord Bingham, who gave the leading speech, identified ... the governing principle in attributing responsibility as that expressed by the International Law Commission ("ILC") in Article 5 (now draft Article 7) of its Draft Articles on the Responsibility of International Organisations.⁵³

Discussing the case of *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway* before the European Court of Human Rights as well as the case of *Al-Jedda v. United Kingdom* before the House of Lords and the European Court of Human Rights, the High Court found that it was "quite clear that the detention of [Serdar Mohammed] is attributable to the United Kingdom. It is unnecessary ... to consider the possibility of joint responsibility, as ... it [is] equally clear that the acts involved in the detention of [Serdar Mohammed] are not attributable to ISAF or the UN".⁵⁴

England and Wales Court of Appeal (Civil Division)

27. In *Serdar Mohammed & Others v. Secretary of State for Defence and Yunus Rahmatullah & the Iraqi Civilian Claimants v. Ministry of Defence and Foreign and Commonwealth Office*, the England and Wales Court of Appeal (Civil Division) recalled that "Lord Bingham (with whom Baroness Hale and Lord Carswell agreed for the reasons he gave) explained that it was common ground between the parties that the governing principle was that expressed by the International Law Commission in Article 5 of its Draft Articles on the Responsibility of International Organizations".⁵⁵ The court also observed that:

Referring to Article 5 of the International Law Commission draft Articles on the Responsibility of International Organizations, the Grand Chamber [of the European Court of Human Rights in the case of *Al-Jedda v. United Kingdom*] considered that the UN Security Council had neither effective control nor ultimate authority and control over the acts and omissions of troops within the Multi-National Force and that, accordingly, the applicant's detention was not attributable to the UN.⁵⁶

After analysing the judgment of the England and Wales High Court, the Court of Appeal stated "that the judge was clearly entitled to conclude and was correct in his conclusion that it is the United Kingdom and not ISAF which is responsible for [Serdar Mohammed's] detention. In these circumstances it is not necessary to address further submissions in relation to issues of joint responsibility".⁵⁷

⁵³ Royal Courts of Justice (England and Wales High Court, Queen's Bench Division), *Serdar Mohammed and Others v. Ministry of Defence*, case No. HQ12X03367, judgment, 2 May 2014, para. 165.

⁵⁴ *Ibid.*, para. 187.

⁵⁵ Royal Courts of Justice (England and Wales Court of Appeal, Civil Division), *Serdar Mohammed and Others v. Secretary of State for Defence*, case Nos. A2/2014/1862; A2/2014/4084; A2/2014/4086, judgment, 30 July 2015, para. 57.

⁵⁶ *Ibid.*, para. 60.

⁵⁷ *Ibid.*, para. 72.

The Hague District Court

28. In *Stichting Mothers of Srebrenica and Others v. State of the Netherlands*, the Hague District Court recalled that:

In the Nuhanović and Mustafić cases the Supreme Court ruled that the criterion for attributing Dutchbat's actions to the State is whether the State exercised *effective control* over said actions. The Supreme Court derives this criterion from Section 7 of the *Draft Articles on Responsibility of International Organisations* (hereinafter to be referred to as: DARIO) that the *International Law [Commission (ILC)]* has drawn up. In the cases referred to the Appeals Court considered that though this provision of *effective control* is only mentioned in relation to attribution to the UN the same criterion holds when answering the question whether actions of troops must be attributed to the state that placed them at the disposal of others. The Supreme Court considered that the IL[C]'s DARIO recommendations and the *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (hereinafter to be referred to as: DARS) may generally be accepted as a reflection of current, unwritten international law and were apparently accepted as such even in 1995.⁵⁸

The court further stated that: “*Effective control* means the actual say or ‘*factual control*’ of the State over Dutchbat’s specific actions. Whether or not this is a point of discussion must be assessed in terms of the circumstances surrounding the case.”⁵⁹

Higher Administrative Court of North Rhine-Westphalia

29. The Higher Administrative Court of North Rhine-Westphalia, in *Anonymous v. Federal German Government*, referred to article 7 of the articles on the responsibility of international organizations when addressing the question whether the transfer of a detained pirate to Kenya conducted as part of the European Union-led naval force (EUNAVFOR) (Operation Atalanta) was attributable to Germany. The court stated that even if

one assumed, in principle, that the Federal Republic of Germany was possibly not responsible due to the integration in the command structure of the EU, the conditions stipulated in international law for the (exclusive) responsibility of the participating international organizations — here the EU and/or the UN — would not be present. Pursuant to article 7 of the “Draft articles on the Responsibility of International Organisations” of the International Law Commission (ILC), an international organization is only responsible for the wrongful conduct of an organ placed at its disposal if it had effective control over the concrete action In a decision invoked by the defendant, the European Court of Human Rights appears to have used this principle, which already constitutes customary international law, in a modified form (“ultimate authority and control — UAAC”) (European Court of Human Rights, Decision of 2 May 2007 — 71412/01 (Behrami and others) — NVwZ 2008, 645, Rn. 138 ff.). In doing so, the European Court of Human Rights turns the

⁵⁸ District Court of The Hague, *Stitching Mothers of Srebrenica v. State of the Netherlands*, case No. C/09/295247/HA ZA 07-2973, judgment, 16 July 2014, para. 4.33 (original emphasis). See also Supreme Court of the Netherlands, *State of the Netherlands v. Mustafić-Mujić* and *State of the Netherlands v. Nuhanović*.

⁵⁹ District Court of The Hague, *Stitching Mothers of Srebrenica v. State of the Netherlands*, para. 4.34.

attention to the global consideration of overall responsibility for an operation — the individual action does not seem decisive anymore.⁶⁰

The Court explained that it would not have to decide which test was applicable because the application of either test would result in the attribution of the relevant conduct to Germany. In particular, the court noted the participating States had “effective and ultimate control” over the operation,⁶¹ and that Germany continuously had control over the concrete transfer of the applicant to Kenya.⁶² Discussing both tests, the court rejected the argument of the defendant that the relevant conduct was only attributable to the United Nations and/or the European Union.

England and Wales High Court (Queen’s Bench Division)

30. In *Kontic and Others v. Ministry of Defence*, the England and Wales High Court (Queen’s Bench Division) noted that: “The Claimants also rely upon what they submit to be widespread criticism of the *Behrami and Saramati* decision. The Claimants rely firstly upon the commentary by the International Law Commission in 2011 on DARIO. The ILC addressed what was by then Article 7.”⁶³ The court continued to discuss the relevant passages of the commentaries to article 7 of the articles of the responsibility of international organizations, relevant case law before the European Court of Human Rights as well as courts in the United Kingdom, and academic literature.⁶⁴ The court then observed that: “While [it] acknowledge[s] the calibre of the ILC Commentary, and of some of the academic criticisms of *Behrami and Saramati*, [it] cannot in the end conclude the arguments are persuasive. The better reading of the evidence is that KFOR was indeed under the effective control of the SRSG, and thus the UN.”⁶⁵ The court also added that: “The Claimants have raised the possibility of dual attribution in this case. However, putting the matter shortly, [it] see[s] no support for that approach in any of the leading cases.”⁶⁶ The court thus concluded “that the relevant acts and omissions complained of are as a matter of law attributable to the United Nations, and not to the United Kingdom”.⁶⁷

Article 8

Excess of authority or contravention of instructions

International decisions

Caribbean Court of Justice

31. In *Trinidad Cement Limited v. The Caribbean Community*, the Caribbean Court of Justice referred to the articles on the responsibility of international organizations when assessing whether Trinidad Cement Limited, a company incorporated in Trinidad and Tobago, had *locus standi* according to the Revised Treaty of Chaguaramas in order to commence proceedings against the Caribbean

⁶⁰ Higher Administrative Court of North Rhine-Westphalia, Fourth Chamber, Case No. 4 A 2948/11, Judgment, 18 September 2014, para. 1.4.2 (unofficial translation by the Secretariat).

⁶¹ *Ibid.*, para. 1.4.2.2.

⁶² *Ibid.*, para. 1.4.3.

⁶³ Royal Courts of Justice, *Kontic and Others v. Ministry of Defence*, para. 108.

⁶⁴ *Ibid.*, paras. 108-120.

⁶⁵ *Ibid.*, para. 131.

⁶⁶ *Ibid.*, para. 132.

⁶⁷ *Ibid.*, para. 135.

Community.⁶⁸ Referencing chapter V of the 2004 report of the International Law Commission,⁶⁹ the court explained that:

The search in the application and interpretation of the Revised Treaty is to discover Community law. In this quest the Court has to apply such rules of international law as may be applicable [Art 217 (1) of the Revised Treaty]. Part of that law is the emerging customary international law on, for example, the concept of *ultra vires* acts of organs of international organizations.⁷⁰

National decisions

England and Wales High Court (Queen's Bench Division)

32. In *Serdar Mohammed v. Ministry of Defence and Mohammed Qasim & Others v. Secretary of State for Defence*, the England and Wales High Court (Queen's Bench Division) asked whether

it [would] make a difference whether [Serdar Mohammed's] detention fell outside the scope of the authority conferred by the UNSCRs which established ISAF's mandate in Afghanistan? This question was not addressed in argument. It appears, however, that it would not, in the light of Article 8 of the ILC Draft Articles on the Responsibility of International Organisations.⁷¹

Part Four

The implementation of the international responsibility of an international organization

Chapter I

Invocation of the responsibility of an international organization

Article 48

Responsibility of an international organization and one or more States or international organizations

International decisions

European Court of Human Rights

33. In *Jaloud v. The Netherlands* the Grand Chamber of the European Court of Human Rights considered the cases of *Mustafić v. State of the Netherlands* and *Nuhanović v. State of the Netherlands* before Dutch courts as relevant domestic case-law.⁷² In this context, the court cited an excerpt from the judgment of the Supreme Court of the Netherlands in *State of the Netherlands v. Nuhanović* in which the court noted that, inter alia, "international law, in particular article 7 DARIO in conjunction with article 48 (1) DARIO, does not exclude the possibility of dual attribution of a given conduct".⁷³

⁶⁸ Caribbean Court of Justice, *Trinidad Cement Limited v. The Caribbean Community*, case No. [2009] CCJ 2 (OJ), judgment, 5 February 2009, para. 41.

⁶⁹ Ibid. See also Supreme Court of the Netherlands, *State of the Netherlands v. Mustafić-Mujić and State of the Netherlands v. Nuhanović*.

⁷⁰ Caribbean Court of Justice, *Trinidad Cement Limited v. The Caribbean Community*, para. 41.

⁷¹ See Royal Courts of Justice, *Serdar Mohammed and Others v. Ministry of Defence*, para. 179.

⁷² European Court of Human Rights, *Jaloud v. The Netherlands*, paras. 70-74.

⁷³ Ibid., para. 74. See also Supreme Court of the Netherlands, *State of the Netherlands v. Mustafić-Mujić and State of the Netherlands v. Nuhanović*.

National decisions

Supreme Court of the Netherlands

34. In *State of the Netherlands v. Mustafić-Mujić* and *State of the Netherlands v. Nuhanović*, the Supreme Court of the Netherlands stated that article 48 (1) of the articles on the responsibility of international organizations “expressly leaves open the possibility of more than one State or organization being held responsible for the consequences of an internationally wrongful act”.⁷⁴

The Hague District Court

35. The Hague District Court in *Stichting Mothers of Srebrenica and Others v. State of the Netherlands* noted with regard to the assessment of effective control under article 7 of the articles on the responsibility of international organizations that “it should be remembered that under Clause 48 DARIO the same act and/or acts might be attributed to both the State and the UN under what is called ‘dual attribution’”.⁷⁵

Part Five

Responsibility of a State in connection with the conduct of an international organization

Article 61

Circumvention of international obligations of a State member of an international organization

African Commission on Human and Peoples Rights

36. In *Communication 409/12, Luke Munyandu Tembani and Benjamin John Freeth (represented by Norman Tjombe) v. Angola and Thirteen Others*, the African Commission on Human and Peoples Rights, when assessing whether the member States of the Southern African Development Community could be held responsible for the suspension and permanent ouster of the Southern Africa Development Community Tribunal, noted that:

The Complainant argues further that by Articles 61(1) and 62(1) of the Draft Articles on the Responsibility of International Organisations as well as by General Principles of International Law, the Respondent States cannot escape liability for breach [of] their international responsibilities by the mere fact that they have established an international organisation, especially if the wrongful act of the International Organisation would have constituted a breach of international human rights obligations were they perpetuated by the states themselves.⁷⁶

While not explicitly referring to the articles in its assessment:

The Commission agree[d] with the Complainant that the correct position of contemporary international law is that in appropriate cases, Member States of an International Organisation could bear direct responsibility for the wrongful

⁷⁴ See Supreme Court of the Netherlands, *State of Netherlands v. Mustafic-Mujić*, para. 3.9.4, and *State of Netherlands v. Nuhanović*, para. 3.9.4.

⁷⁵ District Court of the Hague, *Stitching Mothers of Srebrenica v. State of the Netherlands*, para. 4.34.

⁷⁶ African Commission on Human and Peoples Rights, *Luke Munyandu Tembani and Benjamin John Freeth*, communication 409/12, decision on merits, 30 April 2014, para. 126.

acts and omissions of that International Organisation especially where the rights of third parties are involved.⁷⁷

The Commission concluded that

the current trend in International Law is that where states transfer sovereign powers to an International Organisation and in the course of carrying out the functions assigned to it the International Organisation occasions wrongs that would have invoked the international responsibility of the Member States individually had they acted on their own, the States can individually bear responsibility for those wrongful acts and omissions of the International Organisation. The Complainant has made compelling and uncontested arguments that the Respondent States are collectively responsible for the acts and omissions that constitute the alleged violations of Articles 7 and 26 of the [African] Charter.⁷⁸

Article 62

Responsibility of a State member of an international organization for an internationally wrongful act of that organization

African Commission on Human and Peoples Rights

37. In *Communication 409/12, Luke Munyandu Tembani and Benjamin John Freeth (represented by Norman Tjombe) v. Angola and Thirteen Others*, the African Commission on Human and Peoples Rights took note of the complainant's reference to article 62, paragraph 1, of the articles on the responsibility of international organizations.⁷⁹

Part Six

General provisions

Article 67

Charter of the United Nations

European Court of Human Rights

38. In assessing the grant of immunity to the United Nations in *Stichting Mothers of Srebrenica and Others v. The Netherlands*, the European Court of Human Rights recalled the applicant's argument that

in its comments on the International Law Commission's Draft Articles on the Responsibility of International Organizations the Secretariat of the United Nations itself had recognised differences between States and international organisations on the one hand and international organisations among themselves on the other, but had nonetheless made it clear that it considered the United Nations an international organisation within the meaning of those draft articles.⁸⁰

39. The court then continued to "tak[e] note of the various understandings of the immunity of the United Nations in State practice and international legal doctrine" and observed that:

⁷⁷ Ibid., para. 132.

⁷⁸ Ibid., para. 134.

⁷⁹ Ibid., para. 126. See also Supreme Court of the Netherlands, *State of the Netherlands v. Mustafić-Mujić and State of the Netherlands v. Nuhanović*.

⁸⁰ European Court of Human Rights (Third Section), *Stitching Mothers of Srebrenica v. The Netherlands*, application No. 65542/12, decision, 11 June 2013, para. 130.

In relation to peacekeeping operations, which are seen as “subsidiary organs” of the United Nations, the Secretariat of the United Nations applies a functional “command and control” test as regards accountability but maintains that the organisation enjoys immunity in the local courts (Report of the United Nations Secretary-General entitled “Financing of the United Nations Protection Force, the United Nations Confidence Restoration Operation in Croatia, the United Nations Preventive Deployment Force and the United Nations Peace Forces headquarters” and “Administrative and budgetary aspects of the financing of the United Nations peacekeeping operations: financing of the United Nations peacekeeping operations”, UN Doc [A/51/389](#), paragraphs 7 and 17; “Responsibility of international organizations: Comments and observations received from international organizations”, UN Doc [A/CN.4/637/Add.1](#)). Meanwhile, the Draft Articles of the International Law Commission on the Responsibility of International Organizations are “without prejudice” to the Charter of the United Nations ([...]; see Draft Article 67).⁸¹

The court ultimately found that “in the present case the grant of immunity to the United Nations served a legitimate purpose and was not disproportionate”.⁸²

⁸¹ Ibid., para. 141.

⁸² Ibid., para. 169.